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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1865

WILLIAM F. JORDAN and WILLIAM A. ROGERS,
on Behalf of Themselves and All Others
Similarly Situated,

Petitioners,

vs.

MONTGOMERY WARD & CO.,
Incorporated,

Respondent.

PETITIONERS' REPLY BRIEF

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I

Introduction

Respondent's brief in opposition appears to concentrate exclusively on the proposition that the decision of the lower court was correct, and therefore review by certiorari is unnecessary. It states that the question is "not a difficult one" and infers that the matter was "in no way perplexing" to either the District Court or the Circuit Court. (R-9)[1]

[1] References herein to "A" and "R" refer to the Appendix to the Petition, and to the Respondent's Brief in opposition to the Petition for a Writ of Certiorari, respectively.

This argument falls simply on the procedural basis by which the case presents itself. First, the District Court certified the case under 28 U.S.C. §1292(b) as involving a controlling question of law as to which there is substantial ground for difference of opinion. In its certifying order,[2] the District Court stated as follows:

> "THERE ARE SUFFICIENT GROUNDS FOR DIFFERENCE OF OPINION TO CERTIFY THE ORDER FOR APPEAL.
>
> "Plaintiffs point out the fact that they are catalogue customers and allege that credit advertising plays a different role in connection with a catalogue sale than it does in the conventional retail sale. It is also possible to construe the legislative history of the Act in a different manner than this Court did. Obviously this Court thinks its interpretation of the Act is the proper one. However, it must respect plaintiffs' contentions that a contrary interpretation can be supported and that the dismissal of the contested portions of the complaint might have been in error. Cf. *Brunswick Corp. v. Chrysler Corp.*, 291 F. Supp. 117 (D.C. Wis. 1968).
>
> "AN IMMEDIATE APPEAL MAY MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION.
>
> "In light of plaintiffs' contention that the advertising of credit and the credit transaction are peculiarly intertwined in a catalogue sale, the credit transaction issues currently remaining in the case might have to be completely retried if this Court's ruling were reversed upon appeal after trial on the merits. Cf. *Shawe v. Wendy Wil-*

[2] The order is contained in pp. 29-30 of the Appendix in the Court of Appeals proceedings, which is a part of the certified transcript of record.

son, Inc., 25 F.R.D. 1 (D.C.N.Y. 1960); *Cataldo v. E. I. duPont de Nemours & Co.*, 253 F. Supp. 235 (D.C.N.Y. 1966)."

Second, if the question involved were as simple as respondent claims, the Court of Appeals would not have permitted a purely discretionary appeal. It is submitted, therefore, that the question has been thought more "difficult" and "perplexing" by both the District Court and Court of Appeals than the respondent would have us believe.

II

A Catalog Purchaser Is Not to Be Equated With a Viewer of an "Advertisement"

The bulk of respondent's brief is devoted to the proposition that the civil liability provisions [15 U.S.C. §1640(a), *infra*] of Part B of Truth in Lending do not apply to credit advertising violations under Part C of that Act. We do not contend so. Our contention is that the catalog merchandiser in this case has violated Part B, and that the catalog can be used to prove the violation.

The issue in this case is whether a catalog consumer credit customer who purchases from a non-complying catalog amending an original disclosure, and in reliance on the statements therein contained has a private cause of action under Part B of the Truth in Lending Act.

It is very simple for respondent to say that (1) there is no civil liability for Part C credit advertising violations; (2) that a catalog is advertising, and that (3) therefore there is no civil liability for whatever statements may be made in a catalog. This reasoning, if accepted, would make the Truth in

Lending Act a nullity for the catalog consumers of this country with respect to a private right of action under 15 U.S.C. §1640(a).

Under respondent's theory, all the catalog merchandiser has to do is put out an original disclosure. Then, he may proceed to do as he pleases through his catalog and completely change his financing plan and charges in subsequent issues without any civil liability on the ground that the catalog is mere advertising. (The subsequent periodic statement is of no aid to the consumer, because by that time the merchandise has been purchased and consumed or used, and the finance charge incurred.)

Obviously, if a non-catalog merchandiser amended his original disclosure by a non-complying letter to customers, he would be subject to the civil liability provisions of Part B of the Truth in Lending Act. The catalog merchandiser deals with his customers by catalogs, and if he amends his original disclosure in a subsequent catalog, he should stand on the same footing as a non-catalog merchandiser.

There is nothing in Truth in Lending that says catalog consumers have fewer rights than non-catalog consumers, or that catalog merchandisers are exempt from the civil liability provisions.

III

Only Catalog Customers Are Involved in This Case

The complaint and the facts of the case show that Jordan and Rogers are catalog purchasers. The class consists of catalog purchasers.[3] The plaintiffs are not mere readers of advertisements.

Therefore, it is only necessary to consider whether they are able to prove a violation of 15 U.S.C. 1640(a) which provides in part as follows:

> "(a) Except as otherwise provided in this section, any creditor who fails *in connection with* any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of . . ." (Emphasis supplied.)

Consumer credit transactions occurred. The question is whether the plaintiffs may introduce in evidence the catalog pages which induced them to make the purchases and upon which they relied and which were "in connection with" consumer credit transactions.

The information required under Part B, 15 U.S.C. 1637(a), (1), (2), (3), and 12 CFR 226.7(a), (e), (f),[4] was not supplied to petitioners in the catalog amendments.

A catalog is the representative of the catalog merchandiser in the consumer's home. Simply by the catalog one can place a purchase order on forms provided or by phoning the catalog office. It is the consumer's contact as to the merchandiser's

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[3] Transcript of Record, Appendix, p. 6.
[4] A-14, 15; A-19, 20, 24, 25.

policies. So although a catalog may be a form of advertising, the catalog is also a comprehensive document of company policies. It seems clear that catalog customers are entitled to introduce, as part of the evidentiary history, the catalog pages which were in connection with a consumer credit transaction claim under 15 U.S.C. 1640(a), *supra*.

IV

Legislative History Cited Is Not Applicable to This Case

The authorities cited by respondent do not relate to the facts of the present case which solely involves catalog customers who have made purchases. For example, the following quotation from House Report No. 1040[5] is mentioned:

> ". . . [T]he bill specifically exempts credit advertising from the application of civil penalties. This exemption has been written into the bill by your committee to avoid the possibility that anyone, *not a party to an actual transaction, seeing* an *advertisement* not complying with the disclosure requirements of the bill would attempt to seek civil penalties." 1968 U.S. Code, Cong. & Adm. News, p. 1976. (Emphasis supplied.)

This quotation relating to the earlier House bill is of no relevance to the present case among other reasons because (1) here there are parties to an actual transaction, (2) the

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[5] House Report No. 1040 was dated Dec. 13, 1967, to accompany H.R. 11601. In enacting the Consumer Credit Protection Act on May 22, 1968, the Congress passed the Senate bill (S. 5) in lieu of the House bill after substituting for its language much of the text of the House bill. The statement of the manager on the part of the House on the conference bill is contained in Conference Report No. 1397. 1968 U.S. Code, Congressional and Administrative News, pp. 2021 et seq.

present case does not involve mere "seeing"; instead, it involves purchases in reliance on statements made, (3) the instant case involved a catalog, not a simple advertisement in a newspaper or other advertising media.

There is nothing in the general tenor of the congressional debate on Truth in Lending as we have read it to indicate an exemption from the civil liability provisions of 15 U.S.C. 1640(a), *supra*, for catalog houses, which would be the result of a holding that catalogs amending original disclosures are mere advertising. To the contrary, the catalog houses were most concerned as to methods of interest computation and other matters, and a representative of respondent appeared for all the catalog houses.[6]

Respondent's Administrative Agency Argument Not in Point

Respondent argues that the Federal Trade Commission has jurisdiction over credit advertising violations. We agree.

But we are not bringing this action under Part C, which relates to credit advertising. We are bringing it under Part B for catalog customers who have entered into consumer credit transactions.

Part B, Sec. 1640(a), *supra*, specifically authorizes private civil actions. The fact that the Federal Trade Commission also has jurisdiction in Part B cases in no way deprives an individual from bringing a private action which the Congress has given him.

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[6] Congressional Record, House, January 30, 1968, p. 1437. Some other references to respondent appear on pp. 1442, 1438 and 1590.

CONCLUSION

Here, the claim of a catalog customer is that he purchased merchandise in January upon a stated term of "No monthly payments till June." There was no catalog disclosure that a finance charge would be imposed based on purchase date, rather than the June date. The catalog statement constituted a material amendment of its original disclosure, and was not in compliance with the full disclosure requirements of Truth in Lending, Part B, because there was no disclosure of the time period within which the credit extended could be paid without incurring a finance charge, the balance upon which the finance charge would be imposed, and the percentage rate of the finance charge (15 U.S.C. Sec. 1637(a), *supra*).

These deficiencies constitute violations of 15 U.S.C. 1640(a), and give the catalog consumer a private right of action thereunder. In maintaining such action, he may plead the catalog contents and introduce the same in evidence. The catalog consumer credit customer has the same right of action under the civil liability provisions of the Truth in Lending Act as a non-catalog consumer credit customer.

Respectfully submitted,

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